UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fair Isaac Corporation, a Delaware corporation, Plaintiff, vs. Federal Insurance Company, an Indiana corporation, and ACE American Insurance Company, a Pennsylvania corporation, Defendants.	File No. 16-cv-1054 (DTS) Minneapolis, Minnesota December 13, 2022 3:56 p.m. **REDACTED TRANSCRIPT**

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING - REDACTED TRANSCRIPT)

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good afternoon, everyone. We're on the record in the matter of FICO versus Federal, civil number 16-1054.

Counsel for FICO, if you'll note your appearances for the record, please.

MR. HINDERAKER: Your Honor, Allen Hinderaker from Merchant & Gould. And with me from Merchant & Gould at counsel table is Paige Stradley and Michael Erbele, and behind us is Heather Kliebenstein.

THE COURT: Good afternoon to the four of you.

Counsel for Federal, if you'll note your appearances.

MR. FLEMING: Your Honor, for defendants, Terry Fleming; Leah Godesky, who will be arguing; and Ryan Young.

THE COURT: Good afternoon to the three of you.

So we're here on a motion to bifurcate the trial. I've read everything, so you don't have to repeat what you've said, but you can certainly find ways of emphasizing it.

If you're ready to proceed, go ahead, Counsel.

MS. GODESKY: Thank you, Your Honor.

Your Honor, we have two very different buckets of damages at issue in this case. First, FICO is seeking

actual damages for the breach of contract and copyright claims based on fair market value of a Blaze license for any unauthorized use. And as the Court observed in ruling on the *Daubert* motions on this case, determining the fair market value of the copyrighted work is an objective inquiry that evaluates what a reasonable seller and buyer would pay for a Blaze license in the relevant time period. And we know in 2006, when Federal and FICO engaged in those negotiations, they agreed on a XXXXXXXXXXX license fee for an enterprise-wide license.

The fair market value question will be decided by the jury, and Federal intends to prove that any actual damages in this case will be much closer to the XXXXXXXXXXX license fee that the parties agreed on in 2006 rather than the very fanciful $47 million license fee that FICO intends to present.

Then on the other hand, you have the disgorgement damages claim, and there they're seeking to disgorge up to $35 billion in profits. And this damages claim will be decided by the Court. You've already held that. And the disgorgement framework is completely different. The core question there will be whether there's a nexus between Blaze and defendants' profits. And so the fair market value for a Blaze license, that proxy for actual damages, and the nuances of how Blaze fit into defendants' business, those

are two completely different questions. And as the Court observed in ruling on prior motions in this case, the profits that FICO is seeking to disgorge are not actual damages and they are not a proxy for them.

So in addition to the fact that we have two very distinct inquiries taking place here, we're seeking bifurcation because of the enormous prejudice and confusion that would occur if both damage theories are presented at the same time.

THE COURT: Let me interrupt you for a second. First of all, you used the word "inquiries," but you could also substitute the word "conclusions" for what I think you're saying, to which their response, at least in paper, I think, is they may be separate conclusions, but some of the evidence that the Court or the jury needs to rely on to arrive at those conclusions is the same. So, for example, in the hypothetical negotiation, the revenues, the gross profits, if you will, of Federal and ACE are relevant to that negotiation.

What's your response?

MS. GODESKY: So they've identified two categories of allegedly overlapping evidence, and the first one is they say that defendants' alleged revenue from use of Blaze will be relevant to both fair market value and disgorgement. That's wrong.

We absolutely agree that defendants' total revenue is relevant to FICO's pricing model, and so that will be considered if the jury is evaluating fair market value, actual damages. But it's a completely different thing to say, as FICO does, that in order to determine fair market value, the jury also needs to consider the specific profits that defendants earned from use of Blaze. That's different. That's a different inquiry. Not just total revenue of defendants, but actually how many profits were defendants earning from Blaze, and that's blurring the distinction between fair market value and disgorgement damages.

THE COURT: But wait a second. How does that advance your argument? They're saying when it comes to the hypothetical negotiation, we get to tell the jury, you know, the fact that they're a 13 billion or whatever dollar a year organization is relevant to the license fee we would charge and it's relevant to their expectation of the license fee they would have to pay, so that figure -- that evidence about just total revenue is coming in for that purpose.

And then on the disgorgement, 504(b) says you get to dump it into evidence. You know, here's the 13 billion; you sort out what's profit and what's related or not related.

MS. GODESKY: Your Honor, there's a very different -- it's very different for FICO to say -- present

their pricing model, right, which starts with a very large revenue number, just like it did in 2006. And then when you apply their pricing model to that starting point, you get to a very low number, right? So there was a very large revenue number for Federal back in 2006, billions of dollars, and that got to a XXXXXXXXXXX license fee.

It is very different for them to open this trial and argue that they are entitled to $35 billion in disgorged profits. That framing is enormously prejudicial, and the anchoring effect of presenting that argument from the outset of the trial just cannot be denied.

Your Honor, 1 percent of $35 billion is $350 million, right? And we cite cases in our papers, like the Federal Circuit case in that *Uniloc USA* case, right? There was an observation from the Federal Circuit about how a disclosure that a company has made even only $19 billion has an enormous anchoring effect regardless of whether evidence is then later presented that shows that the infringed product contributed to a small, small portion of it.

And so it's true, the jury is going to hear that these companies have a lot of revenue, right? But then the math of how FICO actually then calculates its license fees in these traditional arm's length transactions translates to a much smaller dollar figure, right? It's very different to say these companies make a lot of money than it is to say we

are entitled to disgorge, ladies and gentlemen of the jury, $31 billion in profits.

THE COURT: So a different way of coming at it, isn't the logical conclusion of what you're arguing then is not that the case should be bifurcated -- the trial should be bifurcated, but that I shouldn't impanel an advisory jury on the question and I should just allow all the evidence to come in, and they have to figure out the license fee and I have to figure out what, if any, profits are to be disgorged?

MS. GODESKY: No, Your Honor, because the prejudice point, the confusion point, if the evidence is presented around the impact of Blaze or alleged impact of Blaze on defendants' business, the $31 billion damages number, the days, probably a week of testimony about whether and how Blaze functioned within defendants' business, all of that is enormously confusing and distracting.

This is a breach of contract case, right? And you can imagine the opening statement in a trial where we're presenting evidence relevant to disgorgement is going to address the nuances of Blaze, how it worked within defendants, right? That's a whole frolic and detour into a week's worth of evidence that wouldn't need to be presented if we're just focusing the jury on the very clear questions of what is the nature and effect of Section 10.8 and 3.4 of

the agreement.

THE COURT: Wouldn't you want that evidence about a frolic and detour to come in to hold down the license fee too? I mean, wouldn't you want to say -- they want to say that we would have negotiated -- that reasonable people would have negotiated a $47 million license but, in fact, Blaze is just a tiny piece of a very large set of software that's only, within that, a tiny piece of our business, blah, blah, blah, blah, blah. All that, what you've described as a frolic and detour, also can be used to argue that so, therefore, the license fee really isn't that high or shouldn't be.

MS. GODESKY: Your Honor, there may be, and of course there will be some evidence in a trial even if disgorgement is bifurcated in terms of what Blaze is and how it functioned in defendants' business. We don't deny that. They're going to need to describe what their product is. We're going to need to describe how the business used it.

But I think, for the most part, in terms of defending the actual damages claim, what you're going to see from us is a presentation of evidence that focuses on the arm's length transaction that happened between these parties in 2006; the many, many, many arm's length transactions that have occurred between FICO and other similarly situated customers over time, none of whom entered license agreements

even approaching the orders of magnitude of what they're demanding here.

And so no, I don't think in order to defend against the actual damages claim there is going to need to be this frolic and detour into the types of recited evidence that you see in their opposition brief, page after page after page from their perspective touting the benefits of Blaze.

What we want to do in this trial is focus the jury on the question of, was there a breach of contract? What was the parties' intent when they entered into this license agreement in 2006?

And I think when you read FICO's opposition papers, you know, there's sort of very short shrift given to the nature of evidence that would have to be presented on this disgorgement claim. I think they say, oh, we just need to put some numbers on a screen and have our expert describe them, but that cannot be further from the truth. I mean, you have to examine each of the applications in which Blaze was used. We have to examine it from a computer science sense, right? What did it mean that this particular software program was one of many that comprised the application? We have to examine it from a business sense. What did it mean that this rules-based software program was used when the rules were written by Federal employees, and

what type of impact did it have on the ability to bring in business on an application-by-application basis? I mean, that is days of testimony that would not be needed at all if we're centering the jury on the breach and copyright questions and actual damages.

And on that point, I would refer the Court to the *Oracle* case that we cite in our papers. I think there was a very astute observation from the judge in that case where there was a bifurcation of certain monetary relief, and the judge said that those questions of monetary relief were poised to present bone-crushing analytics on how to apportion profits attributable to infringement versus profits attributable to non-infringement. So our trial was managed by postponing that mind-bender to phase 2 so that the jury could give its undivided attention in phase 1 to fair use.

And what the jury needs to do in this case is give its undivided attention to the question of was there a breach of contract? What did the parties intend when they entered this license agreement? Not be, you know, head in the -- head in the stars thinking about $350 million in disgorgement damages.

THE COURT: But that argument really seems to prove a slightly different point, which you haven't asked for, and which is better that the trial be bifurcated

between liability and damages, which you haven't asked for and isn't going to happen, okay? But that's what that seems to suggest to me, that quote from *Oracle*.

MS. GODESKY: I don't think so, Your Honor, because I think the bone-crushing analytics that would be required to assess the damages claim, that applies here to disgorgement, right, those very complicated questions of what did Blaze do within these different applications and how did it affect the defendants' ability to sell insurance, which, you know, is not involved at all in evaluating the actual damages claim. So I think that that case quote is exactly on point because the nuances of apportionment on a computer application by computer application basis is, you know, mind-bending.

The other thing I'll say in terms of the argument from FICO that there would be overlapping evidence and this question of whether actual and anticipated profits would come into evidence in evaluating both damages claim, I would point out to the Court that all of the cases that they cite on this, the *Navarro* case, the *Pinn* case, the *Interactive Pictures* case, the *Probatter* case, those are all cases involving damages based on a reasonable royalty rate. And so it's not surprising that the Court in those cases said, yeah, you know, actual profits, future profits, those are relevant to assessing actual damages because when you're

evaluating a royalty rate, you have to consider profits. That's going to be part of the hypothetical negotiation, right? If you have a 10 percent profit margin, you're not going to give an 11 percent royalty rate. That would not be a rational choice.

Whereas here, you know, the question of profits doesn't need to come in at all. And we know that, Your Honor, because we have the benefit of knowing exactly how FICO does business. The record in this case shows, and they say in their opposition brief, the way that they negotiate these license agreements is they look at the revenue that the counterparty brings in, and then they have a formula, and then they also take into account the scope of the license in certain instances, how broadly is it going to be used? But there is never an analysis in their arm's length transactions of the types of profits that are being derived from the use of Blaze. That wouldn't be possible in an arm's length transaction.

So these cases that FICO cites in their opposition are really inapposite to the question presented here.

THE COURT: Go back to *Navarro* for a second. I'll confess that I had focused on a different aspect of that decision and perhaps missed the nuance that you pointed out that the actual damages in that case were reasonable royalty. Is that right?

MS. GODESKY: That's correct, Your Honor. I don't have the *Pinn* cite. I know it's at the very end of the opinion.

THE COURT: But it was a copyright infringement matter.

MS. GODESKY: It was a case where the question was a photograph on an Oil of Olay product and whether there was a -- you know, the copyright to the photo on the Oil of Olay lotion bottle, right? So the type of damages, the Court says at the end of the opinion, was a reasonable royalty rate, and so that's why they were considering the profits from that Oil of Olay product.

And I would also say on *Navarro*, since FICO so heavily cites it, is that's a different case. I mean, that, yes, admittedly involved large numbers too. It involved $600 million in revenue. That was the number that the plaintiff wanted to put out to the jury. $600 million, Your Honor, is not 335 billion, right? One percent of 600 million is $6 million. One percent of 35 billion is $350 million. These numbers have an enormous anchoring effect, and it is not surprising that FICO wants to be able to put that number out in front of the jury from day one.

And I would say that the prejudice and confusion concerns that we've highlighted in our brief are even amplified here because we're talking about an issue that the

jury won't even be deciding at all.

THE COURT: Okay.

MS. GODESKY: Those are the primary points I wanted to cover, Your Honor, unless the Court has further questions.

THE COURT: Well, I don't think so, although -- well, why can't this all be -- if I were to agree that you've raised some concerns, to the extent that the concern is prejudice in the form of confusion or the anchoring effect of big numbers, why can't those all be handled by careful pretrial or preliminary instruction as opposed to bifurcation?

MS. GODESKY: I understand, Your Honor, that the Court obviously is starting from the assumption that the jury will proceed as instructed, and we certainly are too, but I do think, you know, the *Uniloc* case and that Federal Circuit case had it right with that $19 billion damages figure having just too high of an anchoring effect.

And I think that's particularly true here, given not only the fact that we're talking about 35 billion, right? It's an enormous number. But also when you compare it to the actual -- like the reasonable realm of damages for fair market value, right? When these parties were negotiating back in 2006, they agreed on a XXXXXXXXXXXX license fee. So that risk, that anchoring effect, is

enormous here.

And then I don't think an instruction could cure at all the confusion. The week of testimony, dense expert testimony walking through application by application, dueling expert opinions, dueling witness opinions, on how Blaze impacted the defendants' business. I mean, that is a -- I will use the phrase again -- frolic and detour that has nothing to do with the central questions that this jury is impaneled to answer, which are, is the contract breached and was there copyright infringement.

THE COURT: And if so, how much damages are they owed?

MS. GODESKY: And if so, how much actual damages are they owed, yes.

THE COURT: And your argument on anchoring effect is that when and if the jury comes to that question, how much damage they're owed, actual damage, they won't be able to adequately analyze that number because they will be influenced by the $35 billion number.

MS. GODESKY: Correct. And I also think there could even be prejudice to Federal's defense of the liability question in this case, right? If you have the jury consider and evaluate, spend weeks on this, right, the extent of the connection between Blaze and defendants' profits and hearing these giant numbers, that could suggest

to the jury that Blaze is far, far, far more valuable than the XXXXXXXXXXX that Federal paid, right? And that could also taint the consideration of the liability question as jurors inevitably, you know, grapple with questions of fairness.

THE COURT: Well, I'll say it again in a different fashion. It's a sword that cuts in both directions, right? Because the evidence that you'll put on about how Blaze really didn't do very much and it wasn't that useful and we're the ones that wrote the rules and et cetera, et cetera, all of which, to the extent it comes in, comes in at least primarily on the disgorgement side. Maybe not. It also has a tendency to hold down the reasonable license fee, doesn't it?

MS. GODESKY: I think my answer on that is the same, Your Honor. I do think some of that is relevant to holding it down, but there is enormously powerful evidence, objective evidence of, you know, FICO's license fee to Federal and FICO's license fee to other similarly situated counterparties that any reasonable juror is going to see that that $47 million number is enormously inflated.

THE COURT: Okay. Thank you, Counsel.

MS. GODESKY: Thank you, Your Honor.

THE COURT: Mr. Hinderaker.

MR. HINDERAKER: Thank you, Your Honor.

THE COURT: Rather than let you get started, let me jump to one thing and then you can go back and get started.

MR. HINDERAKER: I had such a good opening line too.

THE COURT: What's that?

MR. HINDERAKER: I had such a good opening line too. I'm sorry.

THE COURT: Go ahead.

MR. HINDERAKER: Well, what I was going to say, Your Honor, is that this lawsuit is between some very big corporations -- companies. FICO is a worldwide company with annual revenue over a billion dollars. There is no prejudice card that either party has to play. There is no sympathy card that either party has to play. We're just too big. It isn't David versus Goliath.

Both parties, the best we can ask for is a just result on the evidence, on the law, and that's what we should get. And I think you're -- and my comments are going to be directed to doing exactly that with the advisory jury.

THE COURT: I think -- well, on that statement, I agree. I don't think that -- this isn't a case with an injured person -- a physically injured person suing a huge corporation and you worry about the jury saying, give her a million or two; it's, you know, nothing off -- it doesn't

hurt them.

But I heard two things in particular of interest that I want you to address. One is this notion, at least as I'm understanding it -- I don't think I quite understood it in the same way when I read the papers. But what I'm hearing is that, for lack of a better way of putting it, there's a right number, whatever it is. The jury will decide what the number is for actual damages. They think it's a lot smaller than you think it is.

Their concern is once the jury starts hearing $35 billion, that what they're going to -- it's not that they're going to be motivated by sympathy, but they're going to use that figure to overestimate or overcalculate the license fee figure.

What's your response to that?

MR. HINDERAKER: I'm going to give a long-winded one, and it starts with the proposition that FICO has the right to try its case. This argument started with the notion that our damages for lost license fees is approximately XXXXXXXXXXX because we licensed that amount in 2006. Nonsense.

Our interrogatory answers detail out the basis of our lost license fee as $47 million. The lost license fee is based upon an annual license fee for each year in which a Blaze advisor was used without authority, a stark contrast

to the perpetual license fee that was negotiated in 2006 with a very different organization.

In 2016, when we had the assignment event, when the Chubb Corporation was acquired by a much larger insurance company, there were negotiations for a perpetual license that FICO premised off of a $30 billion enterprise, which was at the time of 2016. That number is in. That number relates to our commercial purpose and our understanding of the breach of paragraph 10.8. It also relates to the license fee that we sought at that time, which was also a perpetual one.

THE COURT: Which was what, if I might ask?

MR. HINDERAKER: About XXXXXXXXXXX.

And our witnesses are going to have to answer the question, why are you seeking $47 million now for four years of use, of unauthorized use, when you were willing to negotiate a perpetual license for three and a half million? And we will answer that. We will answer that to the -- we will answer that on the primary proposition that when we priced that perpetual at XXXXXXXXXXX, we had a lot of other value in place that we felt deserved recognition, and we priced XXX to get that perpetual business relationship for all of the reasons that will be described at the trial. In terms of our theory of the case being honored, our witnesses will explain how $47 million for four years of unauthorized

use is reasonable in light of that perpetual negotiation. They're very different.

Now, Judge Wright has a nice quote that also is part of the answer to the question, which is not acknowledged, but it is this: She was discussing the evidence that's relevant to our lost license fee claim, and she says, quote, at page 55 of the summary judgment order, "This includes evidence of FICO's standard pricing methodology and together with evidence of defendants' use of Blaze Advisor."

So we will put in our evidence of our standard pricing methodology. And we price annual license fees on a standard basis much, much different than we do a perpetual, for all the reasons we'll describe. And then when we put on the evidence of the annual license fee per our standard practices, we will, according to -- and we have to. Judge Wright didn't like how we were doing it before and she says, you have to look at the objective evidence of how the defendants are using the software. And we will do that for the lost license fee. And one thing I do agree with is that our lost license fees are application by application by application.

So, for example, we have -- the largest annual license fee that we seek for the largest application is about XXXXXXXX for one year. The jury should hear why

that's a reasonable amount. It's a reasonable amount for at least these two reasons: One, it's connected to revenue transactions resulting in, just for that application, more than $1,500,000. Our license fee is seeking less than XXXXXXXXXXXXXXXXXXXXXX of the revenue that's connected to the use of Blaze Advisor.

They should also hear for the reasons -- for the intrinsic value of Blaze Advisor to the defendants, all right, it's connected to the revenue, but what good -- how is it connected? It's connected to the revenue because it automates the policy administration system, and if you don't have a policy administration system, you can't sell insurance.

They will have their expert testify about, well, it's just one little bit and one little bit of a big application. And our fact witnesses will say it's the brains or the central nervous system of the application and you cannot automate the human underwriting process without it.

So that's part of my long-winded answer. The rest of the answer I think is this, Your Honor: Underlying the argument that you've heard is this notion that FICO has the obligation to prove profits, FICO has the obligation to prove the nexus to profits. In addition to not being aware of FICO's interrogatory answers, the argument simply ignores

Judge Wright's ruling on summary judgment. FICO's obligation disgorgement is one -- well, it's two things: How much revenue is connected to the use of the applications? Second thing, does the application contribute, at least in some part, to the generation of that revenue? That's FICO's burden to prove.

And on that second place, it also goes to the intrinsic value. The application is important to the would-be licensee because they use it in a system central to the whole process of selling insurance. That's intrinsic value. How useful is it to the process of selling insurance? How significant is it? That's more than $1.5 billion a year. You add up all of those revenue streams on each application, times ten applications times four years, and you get to $35 billion.

There's another application that they have where I think our annual license fee that we seek is XXX -- rather than XXXXXXXXXXXXXXXXXXXXX. Well, why? There isn't much revenue connected to it. It doesn't do as much. It's not as central to their business processes. Central to their business processes is intrinsic value for lost license fees. Central to their business processes is it makes a contribution to revenue, at least in part, under 504(b). It is the same.

In my mind, when counsel argues everything is

premised off of a profit finding, it's certainly wrong as a matter of law per -- well, it's certainly wrong as a matter of law, and Judge Wright happens to agree with it.

But I also think there's some of this to it. You know, in their brief they say our proof of disgorgement is specious. Well, why do they say that, I say? Well, if we don't have any proof of disgorgement, well, then offering the proof of $35 billion of use of our applications for the four years of unauthorized use doesn't have any value, doesn't have any relevance because our claims are specious. But if you turn that proposition around, then you -- our claims are not specious and then the whole argument falls for a false premise.

The *Uniloc* case, which was mentioned a couple times, is worth a few comments. It's a patent case, not a copyright case. In patent law, the patentee has the obligation to apportion and determine the extent to which the technology contributed to the business benefit, to the revenue, to the profit. It is the patentee's obligation to figure out that extent to profit from the technology that is part of a bigger system.

That case stands for that proposition. In that case, the patentee acknowledged that the technology did not drive market demand. The patentee acknowledged he has no basis for seeking damages for the full market value and yet,

in the trial he does the 19 billion full market value number.

None of that is these facts. One, FICO has the obligation to prove gross revenue. Any apportionment is for them, not us.

Two, our evidence of gross revenue is directly connected to the infringement, and the analogy would be directly connected to that little piece of technology in the big piece. We're not -- and in our case, directly connected to the infringement of Blaze Advisor.

THE COURT: Say, hang on a second. Say that again. Gross revenue is directly connected to the infringement?

MR. HINDERAKER: In this case?

THE COURT: Yeah.

MR. HINDERAKER: Yeah. That's the disgorgement case.

THE COURT: I'm not sure I'm following that point. The gross revenue is directly connected -- at least as I understood it, directly connected to or relevant to the hypothetical negotiation on the actual damages side. And then the gross revenues are the starting point for disgorgement, assuming you can connect them to the use of Blaze Advisor, right?

MR. HINDERAKER: Gross revenue is the starting

point for disgorgement.

THE COURT: Right.

MR. HINDERAKER: The defendants' interrogatory answers identify the amount of money connected to the use of Blaze Advisor applications. Their interrogatory answers answer that question: How much revenue is connected to the use of these applications over the infringing period?

THE COURT: I remember we -- I seem to recall we had a discovery dispute about that.

MR. HINDERAKER: We did.

THE COURT: Okay.

MR. HINDERAKER: So there's nothing complicated about putting a table up before the jury that says these are the numbers for these applications according to their interrogatory answers.

THE COURT: This is the revenue associated with these applications which use Blaze Advisor.

MR. HINDERAKER: Exactly. And only that revenue. Unlike the *Uniloc* situation, only that revenue.

And then our other primary burden under 504(b) is to show that using the application made some contribution to the generation of that revenue. And that's where we get into what does the application do? How does it do it? How is it connected to the selling process? That's evidence that 504(b) makes a contribution to revenue. It's also

exactly evidence of intrinsic value of the business purpose, the value of why a licensee would pay something for the license.

There's this argument a number of times about some bone-chilling -- no, bone-crunching testimony about apportionment. Like I said, in a patent case, the plaintiff carries that burden. In a copyright case, the defendant carries that burden.

Their damages expert is a fellow by the name of Bakewell. Bakewell was asked, were you engaged to apportion these revenues to the extent they were related to the infringement as opposed to other factors? And he says, no, I wasn't asked to do that; it wasn't part of my engagement. I don't know of an expert that they have with bone-crushing complexity in terms of apportionment.

They have another expert, more of a technology side, but he didn't do any factual analysis. He just said, well, all the revenue is because they're great companies and they have rules of decision-making, and you use automation to make them more efficient, but that doesn't generate the revenue. That's not a hard argument. It's what they have. The jury can understand it. They'll have counterevidence from us. But this notion of bone-crushing complexity is not something that I understand from our six years of discovery.

The *Navarro* case, Your Honor, that you mentioned,

it was a copyright case, it was photographs, and the reasonable royalty was built off of profits, naturally so. And again, there the amount of damages was directly linked to the benefit from the use. And I can't tell you off the top of my head whether the profit number was because -- I think the profit number was because of the defendants' evidence, that the judge said, well, Defendant, you're going to want to put in your profit number for the reasonable royalty, the same profit number that's disgorgement.

In this case, Mr. Bakewell, the damages expert, he will -- he's opined that the profits are 2.456 billion. Now, if I was the defendants and I was listening to the evidence of the amount of license fees that we want, because our applications in one year generate -- over all ten of them, you know, generate $12, $15 billion worth of revenue, I'd want the jury to hear if I was the defendant, well, yeah it does, but that revenue is, you know, 2.45 billion. Now, it's still a billion, but it's not the numbers that we're -- you know, that the jury is going to hear the full case.

Apparently, according to the defendants, that's not relevant to intrinsic value. I don't understand that because it certainly is. And if they don't want to give it to the jury, then that's fine with me. But this notion of no overlapping evidence simply isn't true.

And frankly, I think that when the Court's idea of

using an advisory jury so that we can -- the Court's idea of using an advisory jury will be beneficial to avoiding any confusion.

We should have a case where each witness comes to the stand and testifies once. Because everything is overlapping, testifies completely once.

THE COURT: Let me ask you a grubby factual question. And recognizing you're an officer of the court, so let's -- we've got the case on liability and actual damages proceeding, and we've got a separate case on disgorgement. How many witnesses do you call in this case that you then call back on this case? That's the first question.

MR. HINDERAKER: Well, I was going to say whether it was going to be all of them or not. We have one witness who's primarily professional services. Probably not him. But we have -- the FICO fact witnesses are going to describe what automated decision-making with Blaze Advisor means and does and how you take a company's rules of decision, let's say underwriting, and how do you automate the human decision-making process of deciding whether to give John Jones, you know, a homeowner's policy without human involvement? They will testify to that. I think that testimony is directly relevant to the intrinsic value of Blaze Advisor to their business. That's why they meet with

customers. Here's our value proposition to their business. Intrinsic value. That same testimony is that's how Blaze Advisor contributes to the generation of revenue. It's connected to a revenue generation event and it helps.

So the damages expert will be the same. The insurance industry expert would be in both places. The people negotiating the terminating the -- the business people involved in terminating the contract will be in both places. In addition to the professional service person, there is a person who was involved in negotiating the 2006 license. She would be not one. And there was a person who was involved in the termination of the license in 2016, and he's not one.

So to answer your question the best I can, I can think of three witnesses who do not -- whose testimony does not relate to both the intrinsic value of the software to the business and to the contribution the software makes to the revenue.

THE COURT: And within those witnesses who straddle both cases -- and I recognize, you know, number one, this isn't exact, and number two, obviously you're going to say one thing, they're going to say another -- but what is your estimate of the overlap between those witnesses? Half of what they say in the first trial they're going to say again in the second trial? What's your

estimate?

MR. HINDERAKER: I can think of some where the overlap is 100 percent because intrinsic value and the contribution to generating revenue are the same thing. I mean, business purpose, how do you use it in the business and the question, how does that generate revenue? Why do you use it in the business and how does it generate revenue are the same thing.

Some witnesses will be -- some witnesses will be maybe 50 percent. I can't sort out -- in my own mind, I can't sort out -- here's why somebody licenses Blaze Advisor: Because it generates revenue. And a witness will say that. Nobody licenses Blaze Advisor for any other reason.

Well, that's the intrinsic value, but it's also part of the 504(b) disgorgement proof. And because we don't have -- we don't try to prove profit, we don't try to prove what portion is not attributable to infringement, those issues aren't on our witness list. Another way of answering your question, I don't have any witness, other than the three that I mentioned, that I think are exclusively compensatory damages, intrinsic value.

THE COURT: Okay. Thank you, Mr. Hinderaker. Anything further, or are you good?

MR. HINDERAKER: Nothing further, Your Honor.

THE COURT: Okay. Thank you.

Ms. Godesky.

MS. GODESKY: Godesky. May I make just four brief points, Your Honor?

THE COURT: Yes. Godesky?

MS. GODESKY: Godesky, yes.

So four points, if I may. Number one, we agree they have every right to try their case on actual damages. They can put out their $47 million figure and the evidence that they say supports it. No one is talking about limiting the evidence on that front. What we are talking about is there's a separate issue with numbers that dwarf that $47 million figure that the Court has decided the Court will not even decide. And so the anchoring effect, the possibility of split-the-baby considerations, right, all of those things that are as old as time, and *Uniloc* is not the only case that raises them, should absolutely factor into the decision here.

Number two, I heard a lot of talk from counsel about this concept of intrinsic value, and they spend a lot of time in their papers talking about how the intrinsic value of Blaze is relevant to the hypothetical negotiations for the license fee, and I don't know where that came from. There is no authority cited in their papers for this idea that intrinsic value is relevant to calculating fair market

value. And it's not. Because, again, how it was just described by counsel, this concept of intrinsic value is, "how significant it is to the process of selling insurance in terms of revenue generated." That is not information that FICO has when it's negotiating an arm's length transaction with an insurance counterparty. That is information that counsel said several times they obtained in litigation through our interrogatory responses, but that is not how they go about pricing their license agreements. They consider other things, and their witnesses will testify about it. But no one is going to say that in a typical arm's length transaction they walk through an analysis of how many profits are generated because of use of Blaze.

The third thing, I would say we don't think it's necessary, Your Honor, to have an advisory jury on this topic. We do object to that. But if that's the direction the Court is headed because of appellate concerns or whatever else might be driving it, there could still be an advisory jury even with bifurcation. That doesn't need to be a barrier to bifurcating the case.

And then finally, counsel has not articulated any real prejudice to FICO that even begins to compete with the enormous prejudice to defendants if disgorgement is presented from the outset of this case. Number one, there would not need to be a repetition of evidence. Everything

that's said during phase 1 could be deemed admitted into the record and the Court could consider it in ruling on disgorgement in phase 2. There would not be a need to recall witnesses to say the exact same thing.

The other piece of this is I went through counsel's paper and they identified in those pages and pages of purportedly overlapping testimony, expert witnesses and three fact witnesses who would be giving testimony on this topic. The experts, they're paid experts. It's not the biggest imposition in the world to require paid experts to appear twice. That's what they do for a living. That's not prejudice.

And then as for the three fact witnesses identified in the papers, there's a Mr. Waid, a Mr. Wachs, and a Mr. Baseman, and as I understand it, two of those gentlemen are current FICO employees. You know, they are a plaintiff in this case, and so I'm sure it can be easily accommodated to have those gentlemen appear twice if need be.

So what we're left with is the possibility of one former employee potentially being called to provide additional testimony on a second day. That is not prejudice that can overcome the anchoring effect and the risk associated with these eye-popping numbers.

Thank you.

THE COURT: Okay. Thank you.

Mr. Hinderaker.

MR. HINDERAKER: Can I respond to those four points?

THE COURT: Go right ahead.

MR. HINDERAKER: Relevant evidence is never unfairly prejudicial. The so-called anchoring, it isn't anchoring for an improper purpose, if there is any anchoring, which I don't see. Nevertheless, the numbers come in because it's relevant evidence to the fair market value of the lost license fees.

Counsel says she doesn't know where this intrinsic value proposition comes from. I refer her to Judge Wright's summary judgment order and *Daubert* order. I think it's docket number 731. She lays out the law and the propositions with respect to that. This is one of those points where it's noteworthy about what isn't said and said depending on what the motion is.

Mr. Bakewell testified to the fact that in a lost licensing fee situation -- McCarter testified to the fact that there's no contribution to revenue because the defendants could use a different product than Blaze Advisor. Mr. Bakewell picks up on that. He's a damages expert. He doesn't know anything about the technology. He picks up on that. And the point being that Judge Wright says: The same

evidence, that is, alternative products, is relevant to two different legal propositions. Mr. Bakewell can testify to the fact that there are products alternative to Blaze Advisor as part of his lost license fee negotiation, downward factor hypothetical, and it also bears on the proposition of disgorgement and any contribution to revenue.

The other point -- another point, the law of damages for infringement is it's a bit backward-looking, but it's the lost -- it's the hypothetical negotiation at the time of infringement for the unauthorized use. As I hear counsel's argument, the proposition is that we would license on a perpetual basis, ongoing business relationship basis, to someone who has infringed our copyrights for four years. It's a non sequitur. It's not how it works. At the time of infringement, what's the value of the fee -- of the software that you're using without authority.

And then finally, as I hear the argument, FICO would be -- would not be permitted to tell the jury that its lost license fee numbers are very reasonable because automated decision-making with Blaze Advisor brought, in the aggregate over four years, $35 billion worth of value through this company -- or these companies. That's fair that we be able to do that. $47 million is not a huge percentage of that number, but it aligns with how we license and the value that the software gives.

THE COURT: Okay. Thank you, Mr. Hinderaker.

MS. GODESKY: Nothing further, Your Honor, unless the Court has questions.

THE COURT: All right. This motion is submitted. We'll get an order out very quickly.

While you're all here, I think I said when you came back we would have further discussion -- maybe I didn't; everybody is looking perplexed -- about the jury instructions and special verdict form I gave you all. I was looking for feedback on that. And Ms. Kliebenstein -- I almost called you Scobie -- you had said that you and Ms. Janus had worked out a proposal for some deadlines for motions in limine or had at least talked about that.

So does anybody recall this other than me? Is this just me?

MS. KLIEBENSTEIN: I recall the discussion on the schedule, and I think we should be in a position to submit --

MS. GODESKY: Very soon.

MS. KLIEBENSTEIN: Yeah. So there are two -- it's going to be a proposed schedule with, you know, all the nuts and bolts that go along with trial. There are going to be two areas where we don't agree --

THE COURT REPORTER: I'm sorry. I can't hear you.

THE COURT: Yeah, come on up to the podium.

Sorry.

MS. KLIEBENSTEIN: We'll be submitting shortly to you a proposal for all of the trial -- the pretrial dates with all the nuts and bolts, jury instructions, things like that, modifications to the same.

There are two areas where we don't agree, the trial brief and the findings of fact and conclusions of law, so that document will set forth both parties' position for you to make a decision on your final order.

And we can submit that -- do you prefer an email so you have a Word copy?

THE COURT: Yes.

MS. KLIEBENSTEIN: Okay.

THE COURT: If I heard you properly. An email to chambers, copying opposing counsel.

MS. KLIEBENSTEIN: Perfect. And we'll have that within the next day or two, the last drafts with Fredrikson.

THE COURT: And in that process, am I getting any input from you on verdict form, instructions, et cetera?

MS. KLIEBENSTEIN: Eventually. Oh, Al is going to take it back.

MR. HINDERAKER: I can answer that, Your Honor.

THE COURT: Come on up.

MR. HINDERAKER: Yes, it will.

First, with respect to the scheduling order that

the parties are negotiating, everything has -- nothing Heather said is wrong. Just the rest of the story is that FICO requested an opportunity to file trial briefs and findings of fact and conclusions of law per the local rules, and the defendants don't want to. That's the conflict. Not the date.

THE COURT: Okay.

MR. HINDERAKER: In terms of your other question, I can tell you that our intention is to take your special verdict form as well as the instructions that you suggested or, you know, the beginning of them and meld them as best we can into FICO's proposed jury instructions. I know that we don't agree with everything that was in yours, and we'll tell you why, and to the extent that yours are what we would have done anyway or are doing, we'll let you know that this is the same as what you proposed.

So that's how I intend, on FICO's behalf, to get FICO's proposed jury instructions to you in a way that melds with what you have given us or identifies any conflict.

THE COURT: Yes. I want to know what you're changing and why, as it were, a low-brow way of saying it.

MS. GODESKY: Mr. Young.

MR. YOUNG: Yeah, Your Honor, I can respond.

THE COURT: You've got to come up here so we can all hear you, though.

MR. YOUNG: Well, I don't have much in addition to add. As Ms. Kliebenstein said, the parties have exchanged proposed orders. You know, we're largely in agreement in terms of dates to exchange things. We've provided dates in which we would exchange, you know, comments to the proposed jury instructions, special verdict form, so we'll get those to you.

The areas in which there are disagreement, I mean, this will be set forth in our proposal to you, but in terms of trial briefing, we certainly understand the local rules provide for trial briefing. In this case, we feel that, in general, the generic sort of rule regarding trial briefing and what is generally submitted is largely going to be information that, you know, we've covered in extensive briefing, and we also understood from your guidance at the first pretrial that, you know, in general, trial briefing probably wouldn't be of a substantial amount of assistance in this case. Certainly if there's, you know, areas of -- you know, factual areas or legal areas that you want the parties to address in briefing, we'd be happy to do that. We just think that it's better than submitting just general, generic trial briefing that we don't think will be of, you know, a significant amount of assistance.

On the second point -- and, again, this will be covered in our proposal, but on proposed findings of fact

and conclusions of law, from our meet-and-confer we understand that what the plaintiff is looking at submitting is just proposed findings of fact and conclusions of law solely related to the issue that Your Honor will be deciding, which is the disgorgement claim. We certainly understand that the local rules provide situations in which proposed findings of fact and conclusions of law are submitted pretrial.

In this case, you know, we view that as an issue that is -- you know, the disgorgement claim is a highly complex issue. It's an issue that will likely -- to the extent we get there and there's a finding on liability, it will involve a significant amount of evidence presentation. Our proposal would be that it would be more efficient for the parties to submit proposed findings of fact and conclusions of law post-trial, to the extent Your Honor wants them, and that we can, you know, after the presentation of all evidence, identify, you know, a briefing schedule for that and what exactly Your Honor wants in addition.

THE COURT: Okay. Understood. You'll be submitting -- the thing that I care most about is I'm going to get from the parties where they think the instructions are wrong or incomplete or shouldn't be had and where the parties think the verdict form is wrong or misleading or

what have you. In other words, I want your feedback on those two things.

MR. YOUNG: Yeah, absolutely.

THE COURT: Okay. Thank you.

MR. YOUNG: Thank you.

THE COURT: All right. Anything further for FICO on this matter?

MR. HINDERAKER: Minor housekeeping.

THE COURT: Yep.

MR. HINDERAKER: February 20th, a Monday, is President's Day. I assume the court is closed and our trial is off, but I wanted to hear it from you.

THE COURT: Well, if it were up to me, we'd go right ahead and continue on with trial, but the courthouse is closed and God knows they don't want to -- I should have said we could go off the record -- but God knows I don't want to figure out what havoc I would wreak by having trial that day, okay? So we're off on the 20th.

MR. HINDERAKER: Yes, Your Honor.

THE COURT: Anything further from Federal?

MS. GODESKY: No, Your Honor.

THE COURT: Thank you, all. We're in recess.

(Court adjourned at 5:03 p.m.)

* * *

I, Paula K. Richter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Paula K. Richter*

Paula K. Richter, RMR-CRR-CRC